

## **ORIGINAL ARTICLE**

# **UTILISING WARRANTY AND INDEMNITY INSURANCE TO ADDRESS ASYMMETRIC INFORMATION**

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### **Abstract**

Although effective due diligence has been made in acquisitions, many legal problems arise due to the fact that there are inaccuracies and misrepresentations in the statements made by the seller after the closing due to asymmetric information. The paper mainly analyzes the importance of the spread of declaration and guarantee insurance as a solution to these problems. Merger and acquisition initiatives are gaining more and more intensity at the national and international level. Compensation responsibilities arising from the violation of declarations and warranties, which are frequently encountered in this process, are among the issues that buyers and sellers fear most. In this context, it is thought that the dissemination of declaration and guarantee insurance is one of the most effective ways to neutralize this risk. Declaration and guarantee insurance acts as a bridge between the protection demands of the buyers and the aims of the sellers to provide a clean exit. Especially in the case of mergers and acquisitions, it helps the contracting parties to minimize their risks by indemnifying the financial losses that may arise due to the declarations and warranties presented regarding the relevant share and the target company by the insurer. With the transfer of the indemnity responsibility arising from the declaration and warranty violations of the seller after the closing to the insurance company, the parties have placed the sales process on a more secure basis. While the buyer has access to the assurance of indemnifying the financial losses arising from the violation of the declarations and commitments presented to him about the share subject to the sale and the target company from the insurance company, the seller will have the opportunity to transfer his portfolio risk-free by transferring his post-sale responsibilities to the insurer. For this reason, declaration and guarantee insurance are frequently preferred by strategic investors, especially hedge funds.

### **Keywords**

Profitability, Liquidity, Internal Capital Generation Rate, Bank size, and Inflation

### **JEL Classification**

K20.

## 1. INTRODUCTION

It is of great importance that the seller present statements and warranties regarding the transferred share and the target company when it comes to the transfer of joint stock companies by sale of shares. The selling price of the shares is determined on the basis of these commitments at first sight. Therefore, in this context, when the buyers find the statements and warranties presented to them insufficient, they refrain from paying the price requested for the shares subject to the sale, thus completing the purchase. (Meyer-Sparenberg & Jäckle, 2022). In some cases, the statements and warranties presented about the relevant share and target company may not provide sufficient information to reflect the real situation for the buyer. In this context, although it is possible for the buyer to reflect (recourse) the material damages that may arise from the incomplete or incorrect transfer of the matters declared by the seller to the seller within the framework of the contractual responsibility, the buyers may generally not want to pay the share price without additional assurances to be offered to them (Meven, 2020, p. 1; Meyer-Sparenberg & Jackle, 2022). In this respect, the risks arising from the lack, non-fulfillment or unreality of the statements and commitments presented in the share sale agreement can be eliminated by the declaration and guarantee insurances taken by the buyer or the seller (Elliers, Koffka, Mackensen & Paul, 2018).

By starting the due diligence process carried out by the buyer, it is aimed to reduce the asymmetric information distribution between the buyer and the target company to a large extent. The fact that the buyer has a SWOT (strengths-weaknesses-opportunities-threats) analysis of the company before the negotiation phase enables future problems with the target company to be foreseen and the price offer is made closer to the real value of the company in addition to the compulsory merger report as per Article 147 of the Turkish Commercial Code (TCC) numbered 6012. With the creation of the buyer due diligence report, the buyer also decides on the declarations and commitments to be demanded from the seller at the points where he hesitates in the light of the relevant report (DePamphilis, 2011, p. 179; Mäntysaari, 2010, p. 429).

Today, warranties and indemnities (W&I) insurance has become a standard tool in civil and common law systems to protect against risks related to breaches of representations and warranties given in the process of mergers and acquisitions. In this context, although the declaration and guarantee insurance, which is the subject of the study, is not common in Turkey, especially in the Anglo-Saxon legal systems and although it has started to be used late, in legal transactions such as share sale contracts in certain Continental European countries, especially Germany, the buyer is offered by the insurer. and implemented as a financial security instrument provided to the seller. This type of insurance, which is widely used in share sale agreements in both common law and civil law systems, acts as a 'catalyst' in the successful completion of mergers and acquisitions.

Although effective due diligence has been made in Mergers and Acquisitions, many legal problems arise due to the fact that there are inaccuracies and misrepresentations in the statements made by the seller after the closing due to asymmetric information. However, in acquisition and merger transactions, the asymmetric information between the parties is reduced by the declarations and commitments made by the target company to the acquiring company. In this context, if the statements do not reflect the truth, the provisions regarding the compensation payment of the seller (or the shareholder who sold his share) are added to the sales contract. It is also possible to envisage provisions regarding the transfer of this price to the seller under certain conditions after the sale price is paid to a third party (a trustee) (Erdem, 2023, pp. 175-176). Therefore, the vast majority of strategic investors especially care about the continuity of company management (management rollover) in the sales made by the managing partners. In this regard, the buyers can maintain the stability of the managers without having to initiate a legal proceeding against the company management, as they will cover the possible losses that may arise after the closing due to the explanations made to them thanks to the W&I insurance. As a result, if strategic investors want to continue their business relations with the vendors who are also

the managers of the target company, one of the most effective methods is to purchase this insurance policies. In this way, the desired long-term business relations between investors (buyers) and sellers will not be eroded by legal disputes (Erdem, 2023, p. 15).

It is important to ensure these risks more comprehensively, especially in mergers and acquisitions, since the liabilities arising from representations and warranties cannot be effectively protected with current insurance products. In the final analysis, this study provides a detailed examination and discussion on the insurability of risks that may arise from mergers and acquisitions through share sales, and potential disputes that may arise from closing updates, within the framework of the legal nature, scope and applicability of the W&I insurance. In particular, the legal consequences of the risk that may arise due to the W&I insurance and the declarations and warranties offered by the seller are undertaken by the insurer instead of the insured. The insurer, on the other hand, secures itself by determining the premium according to the amount of asymmetric information between it and the insured. The issue that poses the most intense risk for the parties in merger and acquisition transactions is the completeness and accuracy of the declarations and warranties. From this point of view, by delegating this risk to the insurer, the parties have the opportunity to finalize the sale transaction more flexibly and without hesitation during the negotiation phase of the contracts.

## 2. THE CONCEPT AND LEGAL NATURE OF W&I INSURANCE

W&I insurance is a type of insurance in which the insurer is responsible for compensation for the risks that may arise from the seller's declarations and warranties in the acquisition of companies through the sale of shares. For this type of insurance, the terms 'Warranties and Indemnity Insurance' are generally used in the international literature and 'Representations and Warranties Insurance' in the USA. When the terminological origin of the concept is examined, the statement of the term 'representation' regarding the company, company assets and liabilities; It can be said that the term 'warranty' refers to other contractual guarantees. In this type of insurance, the Anglo-Saxon literature is so dominant that the use of the term 'W&I-Versicherung' has become widespread in the policies provided by German insurance companies, instead of the term 'Gewährleistungsversicherung', which is the direct equivalent of declaration and guarantee insurance.

In terms of Turkish insurance law, in the share sale agreement, the buyer determines a purchase price in the light of the seller's explanations regarding the target company. The dominant factor/variable in determining this price is the seller's declarations and warranties. For this reason, the buyer may purchase a declaration and guarantee insurance policy to secure the declared and warranted matters. Thanks to this insurance coverage, the buyer will be able to claim directly from the insurer the material damage that arises due to the fact that the seller intentionally or unintentionally made false statements (for example, if the seller knowingly conceals defects). However, the possibility of recourse to the seller by the insurer for the relevant damage is reserved within the framework of the subrogation provisions regulated within the framework of Articles 1472 and 1481 of the TCC. However, on the other hand, the seller may apply to the declaration and guarantee insurance in order to compensate the damages incurred by the buyer due to the declarations he has given on matters that he is not aware of.

The legal consequences of the risk that may arise due to the W&I insurance and the declarations and warranties offered by the seller are undertaken by the insurer instead of the insured. The insurer, on the other hand, secures itself by determining the premium according to the amount of asymmetric information between it and the insured. The issue that poses the most intense risk for the parties in merger and acquisition transactions is the completeness and accuracy of the declarations and warranties. From this point of view, by delegating this risk to the insurer, the parties have the opportunity to finalize the sale transaction more flexibly and without hesitation during the negotiation phase of the contracts. It will help the conclusion of the contract. In this context, it is accepted that the contracting party buyer and seller have declaration obligations one another on fundamental issues that will affect

the basis of the contract (Şenocak, 2007, p. 299; Özdamar, 2010, p. 321; Gezder, 2009, p. 10).

### 3. AN EMPIRICAL ANALYSIS OF W&I INSURANCE

The number of companies entering the liquidation process in 2020 has increased considerably, but on the other hand, mergers and acquisitions initiatives have shown a very low rate in international economic field compared to previous years. However, despite all this negative trend, merger and acquisition transactions have gained intensity again as of the first quarter of 2021. This intensity is expected to increase further in the coming years (Flanagan, Koenigsnecht & Thies, 2022; Beisel & Klumpp, 2016). Indeed, considering the international data, it can be observed that the interest in the declaration and guarantee insurance has increased intensely since the third quarter of 2020. This interest has intensified so much in the first half of 2021 that many insurance companies have reached their sales targets for 2021 in the first half of the year. Thus, the applications for W&I insurance in 2021 were 50 percent higher than those made in 2020. Regarding the sale of W&I insurance, it is seen that there is a demand in 2022 even more than in 2021. This confirms the freshness of M&A practitioners' interest in this type of insurance (Maier, Dunaevsky & Freeburg, 2022; AON Versicherungsmakler Deutschland GmbH, 2019). According to a study, the reasons for dispute after the completion (closure) of the merger and acquisition transactions are the valuation of the target company and the determination of the contract price (38 percent), the declarations and warranties presented in the share sale/transfer agreement (38 percent), tax responsibilities (15 percent), post-closing cooperation (7 percent), pre-contractual non-disclosure/fraudulent misrepresentation (7 percent) and closing irregularities (2 percent) (Esin, 2021, p. 380.) The most important result of this empirical finding is that the existence of declaration and guarantee insurance is much more important in company takeovers through large-volume share sales. (Erdem, 2023, p. 21)

### 4. A BRIEF ANALYSIS OF W&I INSURANCE

During the formation of the share sale agreement, the stages that require the greatest time and effort are the negotiation and research processes involved in determining the declarations and warranties, as well as reaching an agreement between the parties involved (Freund, 1975). The representations and warranties inform the buyer about the material aspects of the target company, reveal which issues need to be examined in more detail, and shed light on the estimated cost of verification and sale. However, an effective declaration and guarantee process helps to reduce the asymmetric information between the seller and the buyer in share transfer agreements in three ways; It (i) imposes a disclosure burden on the target company, (ii) determines the scope of required disclosures, and (iii) provides a reliable basis, reducing the cost of verification (Gilson, 1984, pp. 271-287; Griffith, 2020, p. 1853).

W&I insurance gains importance when the share price of companies in financial distress (distress sale) is significantly below the real value of the company. The buyer takes over the target company, which has difficulties, mostly by assuming its debts (debt deal). The seller, on the other hand, may want to avoid the declarations and warranties requested from him in order not to take on additional responsibility, considering that the sales price of the target company is already kept low. In the light of the above-mentioned issues, it can be stated that W&I insurance provides a significant comfort zone for both the buyer and the seller (Przybytniowski, Borkowski, Pawlik & Garasyim, 2022, p. 100; Demirel, 2022, p. 687; McCann, 2018, p. 258). When the declarations and warranties requested from the seller regarding the risk of not being aware of or not notified during the preparation of the share sale agreement do not affect the sales price, these risks will have a minimal impact on the pricing/valuation of the target company when they are also secured by insurance. Therefore, it is very advantageous for both the buyer and the seller to cover the possible losses that may arise with the completion of the share sale/transfer transactions by the insurer (Akkor, 2018; Borselli, 2022, p. 201).

Target companies are typically companies that are in growing industries or have high potential to

become profitable again after restructuring. However, as in every acquisition transaction, the presence of asymmetric information makes the acquisition of the company by selling shares risky. Since the source of information about the target company consists of the explanations and documents provided by the seller, it is a fact that the seller is always the more knowledgeable party. Since acquiring and making meaningful information is a very costly process, usually the seller provides the buyer with cursory information. The declarations and warranties in the contracts serve as an important tool in order to make the level of knowledge between the parties more symmetrical. The importance of declarations and warranties arises from the fact that the seller is not responsible for the information disclosed. However, as a result of the seller's declarations and warranties, the seller undertakes to the buyer the existence and accuracy of all information other than the explanations included in the subject of the contract.

The academic literature on W&I insurances related to mergers and acquisitions through share sales is not sufficiently developed in our country, and it cannot be said that there has been sufficient examination and discussion on this issue outside our country. In our opinion, the main reason for this is that the declaration and guarantee policies are not made available to the public. Although W&I insurance is, by its nature, an insurance product used to cover the difference between the limit of liability accepted by the seller in the contract and the limit demanded by the buyer, in practice, it is regulated in order to guarantee the entire indemnity liability arising from the statements and warranties of the seller.

It is possible for Turkish insurance companies to offer W&I insurance products within the scope of the principle of freedom of contract. However, the fact that this type of insurance is not defined in the insurance legislation causes it to be described as throwing a stone into a bottomless pit (investing in a product for which there is no legislation), so to speak, for insurance companies. This is due to the fact that Turkish insurance companies have to obtain a separate license in the relevant field for each insurance policy they want to issue. The branches in which the insurance company can issue policies are listed in accordance with the Communiqué on Insurance Branches (2007/1) published in the Official Gazette (RG) dated 11 July 2007 and numbered 26579. Although the declaration and guarantee insurance are not included in the relevant Communiqué, it seems possible to evaluate this type of insurance in the 'general liability' (B-VI-13) or 'financial losses' (I-A-13) branch. In addition to the above-mentioned idea of evaluating W&I insurance as a type of insurance in the 'general liability' (B-VI-13) or 'financial losses', it can also be interpreted as a 'surety' (I-A-15) defined in the same Communiqué. However, the insurance company may offer new insurance policies in the presence of certain conditions: These conditions are that the relevant policies are within the scope of one of the branches listed in the Communiqué and that the T.R. This is the approval of the Undersecretariat of Treasury of the Ministry of Treasury and Finance for this new insurance product. The listed branches are limited and it is possible for insurance companies to carry out insurance activities for a non-Communiqué branch (Erdem, 2023, p. 208; Akkor, 2017, p. 86).

## **5. THE ASYMMETRIC INFORMATION PROBLEM AND W&I INSURANCE AS THE SOLUTION**

Merger and acquisition agreements are agreements where asymmetric information and disclosure create legal problems. In particular, the buyer's need to have incorrect or incomplete information on fundamental issues such as the target company's turnover, expenses, customers, and employees prevents the determination of the sales price, and this situation is the beginning of legal problems between the parties. In this context, the existence of W&I insurance, which has become very popular in recent years, provides a very effective negotiation opportunity for both the buyer and the seller. Because the parties provide an assurance through the insurance company regarding the compensation of material damages that may arise in case of breach of declarations and warranties (Choi & Triantis, 2010, p. 856).

It is certain that there is an informational injustice between the buyer and the seller in the purcha-

sing process. It is certain that the buyer, who has less information about the product compared to the seller, is the disadvantaged party in the sales contract (except for sales under pressure). In this case, the probability of the buyer completing the agreement without being sufficiently informed is very low. The reason for this is that the buyer sees every element that he does not know about the product as a deficiency and makes low pricing accordingly. When an evaluation is made on the axis of mergers and acquisitions, it can be said that the acquiring and target companies have opposing interests. While the transferee company aims to make the valuation of the target company over the lowest possible price and to complete the closing over this amount; the target company will try to show the company value (reputation, value of its affiliates, financial reports, receivables, insurance policies, etc.) as high as possible. This situation usually occurs when the target company sells its shares under pressure at a lower price than their value (distress sales). In this context, many companies prefer declaration and guarantee insurance, which is a type of 'transactional insurance' that can eliminate the risks arising from mergers and acquisitions. The parties establish their economic security by securing their economic interests by transferring their legal responsibilities that may arise due to the statements they have made in the context of the share sale agreement to the insurer; they eliminate the adverse selection and moral hazard problems to some extent (Erdem, 2023, pp. 39-40; Borselli, 2022, pp. 199-200). W&I insurance presents a moral problem in the merger and acquisition process. Namely, since the seller is the one who has direct information about the target company and can access it, it is possible that a kind of 'credibility problem' may arise when insurance is made. The seller, who delegates his responsibilities regarding representations and commitments to the insurer, may refrain from exercising due diligence while providing the relevant information. Therefore, adverse selection and moral hazard problems will arise. This problem will arise more for types of companies that are not open to the public and therefore do not have a public disclosure obligation. If the target company is already a publicly traded company, the due diligence has likely been conducted based on publicly available information. Consequently, it becomes challenging for the buyer to identify shareholders who may seek compensation for any losses resulting from this information.

Adverse selection means that the insurer's risk pool is constantly filled with high-risk insurances; This is due to the fact that the policyholder is more advantageous than the insurer because he has more information (Baker, 2006). For this reason, the policyholder will only want to have declaration and guarantee insurance for high-risk mergers and acquisitions. However, as a result of due diligence reports prepared for mergers and acquisitions and statements and warranties submitted by the seller, information inequality (information asymmetry) is minimized and insurers can determine the amount of premiums based on the risks they have determined and calculated. In the light of all these discussions, W&I insurance can also be compared to directors and officers (D&O) insurance (Baker & Griffith, 2007, p. 1808). There is asymmetric information in executive liability insurance, but there are not only high-risk but also low-risk policies in the insurance pool (Korkmaz, 2016).

To address the issue of adverse selection, each party involved in the contract might request a declaration and guarantee insurance. The seller may choose to take out insurance instead of undertaking the specified amount of indemnity, and the buyer may choose to take out insurance for a purchase that may be quite risky for him in the light of the information he has, instead of taking the risk himself. In these cases, the contracting parties can profit from this trade by placing themselves under insurance protection, as they have more information than the insurer. The insurer, on the other hand, will try to determine the insurance premium as high as possible, taking these possibilities into account. In this case, the declaration and guarantee insurances to be demanded by buyers and sellers for non-risky mergers and acquisitions will become quite expensive. If the insured has more precise information about the risk, it may be possible to turn this into an advantage and take out insurance. However, it can be said that the W&I insurance policies reduce the risk of adverse selection in a way. That is, insurance does not cover risks that are already known or learned but not disclosed in the due diligence process. This insurance will only cover 'unknown unknowns' (Griffith, 2020, p. 1911).

In fact, it is the lack of information that determines the amount of insurance protection that buyers

need. The more asymmetric information, the more insurance will be needed to complete the purchase by undertaking these risks (Siegelman, 2004, p. 1223). In the case of adverse selection, since the risk is considered to be higher than the average (ordinary) risk, the contracts will be insured with higher insurance policy prices. In this context, the insurance company will create an insurance pool where the risk cannot be determined exactly. Some of these risks are below average and some are above average. However, an average policy price will be offered to those with below-average risk. In this scheme, over time, policyholders will cease to take out insurance, thinking that they are funding high-risk policies, and will instead take risks to purchase cheaper products without insurance protection (Romano, 1989, 27-29; Griffith, 2020, p. 1873; Rothschild & Stiglitz, 1976, p. 629).

Purchasing W&I insurance is a manifestation of risk aversion. However, mergers and acquisitions are inherently risky. Likewise, considering that the purchasing companies are generally equity companies, it is certain that these companies make a natural effort to avoid risk. According to the opposing view in the doctrine, it is very difficult to explain the declaration and guarantee insurances as an output of the risk aversion motive. The reason for this is that capital companies are used to this risk as they distribute the risk to their shareholders and it is thought that earnings will increase with the increase in the risk (Goldberg, 1990, p. 216; Goldberg, 2009, p. 541).

Insurance companies are institutions that price the risks and pay the losses incurred with the premiums they collect in return for the risk they undertake. In this respect, as the number of transactions they have made increases, they can make more precise actuarial calculations and moreover, they gain experience on how to minimize the losses that may arise. It also guides policyholders in line with their experience and shares methods of avoiding loss through risk management (Yin, Kunreuther & White, 2011; Bake & Swedloff, 2013, pp. 1421-1422; Griffith, 2020, p. 1890; Ben-Sharar & Logue, 2012, pp. 210-212). In fact, the risk is classified technically and rationally in accordance with the actuarial, statistical and, in more general terms, the law of large quantities, and a kind of loss-prevention or mitigation service is provided by the insurance company.

There is an asymmetric information problem for the insurer of the W&I insurance. However, it also carries some idiosyncratic risks. This is because the policy is based on the buyer's statements and there is no clarity about the accuracy or completeness of the relevant statements. Although insurers have the opportunity to conduct their own research and initiate a detailed due diligence process, they instead seek to compensate for the disadvantageous situation that may arise from asymmetric disclosure by providing damage prevention and mitigation services. It should also be noted that the W&I insurance is purchased before the sales contract is signed. In this process, insurers generally do not comment on the sales contract and do not propose draft work. They evaluate only the possibilities of recourse that may occur later, by examining the issues such as the definition of 'deception' in the relevant contract and determining the issues that should be excluded from the insurance coverage in the parts that they deem problematic in the due diligence report. In this respect, it can also be claimed that the insurer pursues its own interests rather than preventing the damage.

As insurers with loss insurers face similar claims many times, they gain experience in meeting the relevant claims effectively. They can avoid additional costs by choosing the most advantageous option of paying the damage or filing a lawsuit. In the axis of declaration and guarantee insurance, that is, in this type of insurance where the indemnity responsibility of the seller is undertaken by the insurer, the insurer pays or refuses to pay the amount for which it is responsible, following the policyholder's request for the payment of the relevant compensation. In cases of rejection, the parties will resort to litigation (Silver, 2015, p. 138; Mayers & Smith, 1987, pp. 45-54). Contracting parties may be compelled to take out representations and warranties due to pressure from creditors (lenders) and other contracting parties. In this context, W&I insurance will especially encourage the creditors of the target company and other persons and companies with which they have business relations to have a positive attitude towards the purchase since the insurance to be made provides an important guarantee for the stable continuation of the activities of the target company (Erdem, 2023, p. 48).

## 6. CONCLUSION

Since the parties of the share sale contract try to minimize their responsibilities and get the maximum benefit from the contract while preparing the contract, their interests are positioned in opposition to each other. This controversial situation causes the negotiation stages to be very arduous. However, the majority of disputes experienced by the parties after the transfer of shares (closure) are based on disagreements regarding the scope and accuracy of statements and commitments. The parties may also be confronted with the implementation of these provisions in cases where the price is adapted, kept in a trust account or partially paid, or if there are special provisions such as non-compete in the contract. In this study, W&I insurance contracts, which are implemented in many jurisdictions, but are quite uncommon in Turkey, in order to protect against the risks that may arise from joint stock company transfer transactions (in the context of mergers and acquisitions) through the sale of shares are evaluated in the context of TCC. W&I insurance, which is a common practice in Anglo-Saxon legal systems, is a foreign concept to the Turkish insurance and legal system. This study includes preliminary legal discussions on this type of insurance, showing the need for insurability of statements and warranties.

W&I insurance is used to greatly reduce the risks arising from mergers and acquisitions. In this context, while private equity funds attract great attention by venture capitalists and other investors, nowadays they are purchased for mergers and acquisitions of almost all kinds of commercial enterprises, including publicly traded companies (McCann, 2018, p. 19; Erdem, 2023, p. 205) In mergers and acquisitions, the parties must decide as soon as possible whether to purchase a declaration and guarantee insurance policy. The decision to take out insurance, especially at the beginning of the sale process, creates a wider comfort zone for the parties in negotiations. In addition, the insurance process can be started simultaneously with the beginning of the share sale agreement negotiations. W&I insurance is the transfer of the seller's responsibilities arising from the statements and commitments presented in the share transfer agreements (possible liabilities that may arise in the future) to the insurance company in return for an insurance premium. Although this type of insurance has a long history, it has only started to gain popularity in the last few years (Marsh, 2022; Gingold, 2018). Unfortunately, it is quite late for the development and implementation of W&I insurance in Turkey, which is evident among the rapidly developing economies. Although there are many mergers and acquisitions in Turkey, the clearest data on this subject can be evaluated in the '2022 Merger and Acquisition Outlook Report', which presents the numerical analysis of large-scale transactions that require permission from the Competition Board (Competition Authority, 2023). Accordingly, within the framework of the Communiqué No. 2010/4, only 82 out of a total of 245 permit requests examined during 2022 in order to prevent permanent anti-competitive changes in the control structures of undertakings are domestic undertakings established in accordance with Turkish laws.

The total value of these reported transactions is 72,2 billion Turkish Liras. The remaining permit requests are related to the mergers and acquisitions carried out by foreigners abroad, with a total cost around of 5,7 trillion Turkish Liras. In addition, while the average of the transactions examined for the last ten years is 219 per year, 310 and 245 transactions were examined in 2021 and 2022. From this point of view, it will be to the advantage of domestic insurance companies to operate in such a market, especially considering the size and intensity of the transaction volume. Moreover, in cases where the buyer company is foreign, it is normal for companies to give up on purchasing due to regulatory risks and domestic dynamics. In this context, effective implementation of declaration and commitment insurance will pave the way for foreign capital to invest in Turkish companies and company shares. W&I insurance, which has become one of the most common tools in mergers and acquisitions, is a very useful type of insurance for the order of commercial life, as it can compensate the parties' losses in a very short time in case of violation of the information disclosed and committed in the share sale agreement. In the light of deep-rooted British and American practices, it has been observed that German and French insurers have also tried to integrate declaration and guarantee insurance into commercial life in recent years. In the context of Turkish insurance law, declaration and guarantee

insurance, which has not yet been adequately addressed in terms of both academia and practice, is likely to gain popularity in the near future. The fact that trade gains have a cross-border dimension and especially company takeovers take place internationally will require the Turkish insurance market to prepare itself for W&I insurance.

Legal regulations regarding W&I insurance, which is a fairly new type of insurance for the Turkish insurance market, do not exist yet. In this context, the parties to the transaction should apply to foreign insurance companies in cases where they want to make such an insurance. Moreover, since such a market has not yet developed in our country and there is no local competitive pressure in this area, foreign insurance companies demand high premiums in return for the services they provide. Considering this situation, it is necessary to provide the legal infrastructure for this type of insurance, which will facilitate cross-border M&A transactions between Turkish companies, as soon as possible. As a matter of fact, there is no special regulation in the Turkish Commercial Code regarding the liability arising from the seller's declarations and warranties in the context of share sale agreements. In case of disputes that may arise in this regard, the provisions regarding the seller's liability of guarantee against the basic defect regulated by the Turkish Code of Obligations (TCO) No. 6098 may be applicable to the extent that they are appropriate. It is known that there are fundamental differences between the prioritized objectives of the TCC and the TCO. In this context, it is important to enact the declaration and guarantee insurance specifically.

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